

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF CALIFORNIA  
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4 ODYSSEY WIRELESS, INC.,, ) Case No. 15CV1735-H(RBB)  
5 Plaintiff, ) San Diego, California  
6 vs. ) Friday,  
7 APPLE, INC., ) December 4, 2015  
8 Defendant. ) 10:30 a.m.

9 ODYSSEY WIRELESS, INC., ) Case No. 15CV1738-H(RBB)  
10 Plaintiff, )  
11 vs. )  
12 SAMSUNG ELECTRONICS CO., LTD, )  
13 et al., )  
14 Defendants. )

15 ODYSSEY WIRELESS, INC., ) Case No. 15CV1741-H(RBB)  
16 Plaintiff, )  
17 vs. )  
18 MOTOROLA MOBILITY, LLC., )  
19 Defendant. )

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24 Proceedings recorded by electronic sound recording;  
25 transcript produced by transcription service.

1 ODYSSEY WIRELESS, INC., ) Case No. 15CV1743-H (RBB)  
2 )  
3 Plaintiff, )  
4 )  
5 vs. )  
6 )  
7 LG ELECTRONICS USA, INC., )  
8 et al., )  
9 )  
10 Defendants. )  
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TRANSCRIPT OF TELEPHONIC MOTION HEARING  
BEFORE THE HONORABLE MARILYN L. HUFF  
UNITED STATES DISTRICT JUDGE

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1 SAN DIEGO, CALIFORNIA FRIDAY, DECEMBER 4, 2015 10:30 A.M.

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3 (Call to order of the Court.)

4 THE CLERK: Your Honor, may I call the case?

5 THE COURT: Yes, you may.

6 THE CLERK: Calling matters one, two, three and  
7 four on calendar.

8 Number one on calendar, 15CV1735, Odyssey  
9 Wireless, Inc. versus Apple, Inc.

10 Number two on calendar, 15CV1738, Odyssey  
11 Wireless, Inc. versus Samsung Electronics Company, LTD., et  
12 al.

13 Number three on calendar, 15CV1741, Odyssey  
14 Wireless, Inc. versus Motorola Mobility, LLC.

15 And number four on calendar, 15CV1743, Odyssey  
16 Wireless, Inc. versus LG Electronics USA, Inc., et al.

17 All foregoing matters are set for a telephonic  
18 motion hearing.

19 THE COURT: Good morning. State your appearances.  
20 First for the Plaintiff.

21 MR. CAMPBELL (telephonic): Good morning, your  
22 Honor. This is John Campbell with McKool Smith for Odyssey  
23 Wireless.

24 THE COURT: Thank you. And then for the Defense.

25 MR. DAMSTEDT (telephonic): Good morning, your

1 Honor. This is Ben Damstedt from Cooley, for Apple, and with  
2 me is my partner Tim Teter.

3 MR. REZ (telephonic): Your Honor, this is -- on  
4 behalf of the LG Defendants, this is Donald Rez from  
5 Sullivan, Hill, Lewin, Rez and Engel, and with me on the call  
6 is Brian Tollefson from Rothwell, Figg.

7 MR. ALY (telephonic): Good morning, your Honor,  
8 this is Amr Aly of Mayer Brown, with me is Joy Lee from  
9 Motorola Mobility.

10 MR. PARK (telephonic): Good morning, your Honor.  
11 This is Steve Park from Paul Hastings, on behalf of Samsung  
12 Defendants, and with me is Evan Mclean, also with Paul  
13 Hastings.

14 THE COURT: Do we have all counsel now on -- that  
15 have stated their appearance?

16 (No response.)

17 THE COURT: I believe so.

18 So, there's a motion to compel. The interrogatory  
19 number six says,

20 "Identify and Claim Chart Form.

21 All portions of the specifications in  
22 each earlier patent application to which  
23 the patents in suit allegedly claim  
24 priority that Odyssey contends,  
25 discloses each element of each asserted

1 claim."

2 And then interrogatory number four says,

3 "To the extent Odyssey contends  
4 that any secondary indicia of non-  
5 obviousness apply to the alleged  
6 inventions claimed in the asserted  
7 claims for each such claim described in  
8 detail, all evidence of any alleged long  
9 felt unsolved need for the claimed  
10 invention, failure of others to meet  
11 such need, copying of the claimed  
12 invention, any commercial success which  
13 has a nexus to the claimed invention,  
14 praise of the claimed invention by  
15 others, skepticism of the claimed  
16 invention, unexpected results of the  
17 claimed invention, and all other  
18 evidence of secondary factors of non-  
19 obviousness, under 35 USC Section 103,  
20 commonly referred to as the Graham  
21 Factors (phonetic)."

22 So, after reviewing the papers in support and in  
23 opposition of the motion, the Court's tentative as to  
24 interrogatory number six is to grant it, except that if the  
25 parties don't want to do it in claim chart form, that would

1 be fine.

2 But, I do believe that Plaintiff Odyssey, as a  
3 Plaintiff, needs to tell facts to support the claim of  
4 priority. That's not the same as disclosing expert reports  
5 at this stage. But, it is fair for the Defendants to know  
6 how does the Plaintiff claim priority. And the Court  
7 believes that that's a proper interrogatory.

8 As to the Graham Factors, the Court believes that  
9 the Graham Factors should be identified. It's not an issue  
10 of burden of proof, it's an issue of answering an  
11 interrogatory about the Graham Factors. And so the Court  
12 does believe that it's proper for the Plaintiff to disclose  
13 information it has concerning the Graham Factors.

14 As to both of them, if additional information  
15 becomes relevant, and responsive, the Plaintiff may at a  
16 later point in time supplement the responses, as required by  
17 law.

18 So, that's the Court's tentative. I think then  
19 with that tentative the burden may be on the Plaintiff  
20 Odyssey to speak first.

21 MR. CAMPBELL: Yes, your Honor. Thank you. This  
22 is John Campbell for Plaintiff Odyssey Wireless.

23 Let me, if I may, take them in reverse order and  
24 start with interrogatory number four.

25 I think -- I think we would need some

1 clarification, because we did provide in our interrogatory  
2 response the factors that we would rely on, and we provided  
3 all the facts that Odyssey Wireless is currently aware of  
4 that support the secondary consideration factors that we  
5 would rely on.

6           What we have not provided is the expert opinion  
7 that would go along with that. And the issue is whether  
8 those should be provided at this stage of the case, and  
9 really how they could be provided at this stage of the case  
10 given the Defendants' invalidity contention.

11           Odyssey Wireless, in its interrogatory response,  
12 stated that for a number of the factors that relate to  
13 responding to the Defendants' invalidity contentions about  
14 how the prior order fails to recognize a proposed solution,  
15 how the prior order fails to suggest the claimed invention.  
16 It's just very -- it's pretty much impossible to respond,  
17 because Defendants' invalidity contentions raised 143  
18 references, and they assert that they can do any combination  
19 of any number of references in this case. So, those  
20 combinations just become astronomical.

21           So, to provide expert opinion that this stage of  
22 the case, in general, given the scheduling order, seems  
23 inappropriate, and certainly seems inappropriate given that  
24 it's just -- it's impossible to respond to those contentions,  
25 given the level of detail.



1 THE COURT: Well --

2 MR. CAMPBELL: So, again, we -- I'm sorry, go  
3 ahead, please.

4 THE COURT: So, your answer says,

5 "Plaintiff believes numerous  
6 secondary considerations of non-  
7 obviousness will weigh heavily against  
8 defining that the claimed inventions are  
9 invalid as obvious."

10 But, you only cite in the response one document,  
11 Odyssey 0006163, and that's with respect to praise for the  
12 systems and methods embodied by the claimed invention.

13 And then you say that,

14 "The prior art taught away from the  
15 claimed inventions with particular  
16 properties as claimed. Plaintiff  
17 expects to expand upon the discussion of  
18 this secondary consideration of non-  
19 obviousness through the use of expert  
20 reports and testimony to rebut any  
21 expert report or testimony submitted by  
22 Defendants with respect to validity."

23 I understand that. But, the prior art taught away  
24 from the claimed invention, you need to give more information  
25 about how did the prior art teach away from the claimed

1 inventions with particular properties as claimed. And then  
2 you say,

3                   "The prior art failed to recognize  
4                   and/or propose solutions for the  
5                   particular problems solved by the  
6                   claimed inventions with particular  
7                   properties as claimed."

8 And then you don't have any facts to support that. And then,  
9 "the claimed inventions were not previously suggested in the  
10 prior art." I guess that's a negative, so I guess there  
11 wouldn't -- you would -- that's probably self-contained  
12 there.

13                   But then,

14                   "The systems and methods  
15                   embodied by the claimed inventions  
16                   ultimately proved commercially  
17                   successful in the marketplace, as shown  
18                   by the commercial success of Defendants'  
19                   devices that practice the 4G LTE  
20                   standard."

21                   Now, on that one, I would think that you would  
22 have more information now beyond just your expert report  
23 information.

24                   And then,

25                   "There was a long felt but

1 unmet need for the claimed inventions,  
2 as shown in teachings in the prior art,  
3 through a general desire in the industry  
4 for the provision of additional  
5 bandwidth to mobile users and a general  
6 desire in the industry for achieving an  
7 increased battery performance of mobile  
8 devices."

9 And then I think you need to give more specifics, or some  
10 illustrative examples that you have. If they have 132  
11 combinations, then maybe you don't have to do 132  
12 combinations in reverse.

13 But, I do think you need something beyond your  
14 initial sort of general statement. And that's true then,  
15 also there was industry acceptance of the claims solution, as  
16 shown by the adoption of the 4G LTE standard. I think you  
17 should cite to something there. And, "others fail to arrive  
18 at the invention," I guess that's probably self-explanatory.

19 So, in the entirety of your Graham Factors,  
20 there's only one document that you reference. And I think,  
21 without disclosing all of your expert reports at this stage,  
22 I do think you can -- you should, as Plaintiff, have more  
23 specific information that would address the Graham Factors.

24 I do understand obviousness is by clear and  
25 convincing evidence, and has to -- is defense to the

1 infringement challenge propounded by the Defendants. At the  
2 same time, they've asked you, "are you going to say that any  
3 of these Graham Factors apply?" And you say, "yes, we're  
4 going to say that they all apply." You need to do a better  
5 job, to the extent you can, in providing more specific facts  
6 at this stage, without prejudice to supplementing the  
7 information. And clearly you've put the parties on notice  
8 that more information will come in the expert report.

9           In part, the case that you cited, it is true on  
10 scheduling, these things can come up at any number of times,  
11 but under our local rules we're a lay all the cards on the  
12 table district, so that everybody has all the information up  
13 front. And so we don't have to wait until the fast paced  
14 expert reports, where we're near the end and getting ready  
15 for trial, if there's something that the defense would know,  
16 and you would know by telling each other in disclosures, in  
17 answers to interrogatories, this information, then that would  
18 be useful for all parties to properly evaluate the case.

19           Does that help you, Mr. Campbell?

20           MR. CAMPBELL: I want to be honest, Judge, and I  
21 also want to be respectful. It helps a bit, but, you know, a  
22 lot -- when we're referring to the prior order -- you know,  
23 we're referring to the prior order combination, the  
24 Defendants are alleging, and it's not the number of pieces of  
25 prior art, but it's the combinations which are astronomical.

1 Certainly for some of them, you know, it's embodied in a 4G  
2 LTE standard, I mean, we can add a citation about our  
3 infringement contention, if that helps. The same for  
4 industry acceptance of a 4G LTE standard.

5 But, we're really not -- there's really not any  
6 cards we're trying to hold back. We provided all the facts.  
7 It's really a matter of a number of these factors relate to  
8 the prior art that Defendants step forward in their validity  
9 contentions. And those combinations are just so astronomical  
10 at this point it's very difficult to respond to that. But,  
11 we will take your Honor's guidance and do our best.

12 THE COURT: Well, and so one thought, on that  
13 other side is you could send an interrogatory to them saying,  
14 "tell me your best five combinations of the prior art." If  
15 they can't prove obviousness by the best five, then certainly  
16 the lessor combinations are not going to be very persuasive  
17 either, or say, "tell me your best 10 combinations." And  
18 then they can say, "well, here's our strongest ones." If  
19 your strongest ones are not obvious, then your weakest ones  
20 are not going to be obvious. On the other hand, if your  
21 strongest ones, they would say, "these are all obvious," then  
22 the Graham Factors do come into play.

23 So, I think you just need more. These are  
24 judgment calls, but I think yours is bare bones more  
25 conclusory statements. And now that you know, through their

1 charts, what prior art references combinations they are  
2 contending, then I think you can then try to either narrow  
3 the field with them, or respond more, because I do think  
4 they're entitled to know what things you consider to be the  
5 Graham Factors.

6 MR. CAMPBELL: Yes, your Honor. We'll send that  
7 interrogatory and we will supplement a response.

8 THE COURT: And then I think the supplemental  
9 response should be due in -- within 30 days.

10 MR. CAMPBELL: Yes, your Honor.

11 THE COURT: Then what about the other  
12 interrogatory, anything on that?

13 MR. CAMPBELL: So, very briefly, your Honor. The  
14 other interrogatory, it's really -- I mean, it is really a  
15 matter of the stage of the case. And if your Honor has  
16 reviewed the University of Virginia case, then there's  
17 probably nothing more for me to say, because that opinion is  
18 only four months old, and the court pretty much analyzes the  
19 exact same facts we have here. It's close to being on all  
20 fours as I've seen in an opinion. It comes out that the  
21 local rules provide for a certain procedure, and the local  
22 rules provide the prior date with your infringement  
23 contentions, which nobody disputes that we haven't done. And  
24 then what the University of Virginia case says is that these  
25 are very -- the priority days and the 112 support, they're

1 intertwined, that's very obvious from the Defendants'  
2 invalidity contentions where they make their case based on a  
3 failure to respond and determine that doing it at this stage  
4 in the case is not helpful asking a party to defend the  
5 validity of its claims. At that stage it's an orderly  
6 development of the case, is what they say. And so, they look  
7 at all the opinions out there and say that the courts that  
8 compel the parties to answer this kind of interrogatory, do  
9 so after the parties have undergone more discovery and  
10 narrowed the issues through invalidity of contentions claimed  
11 construction, depositions or expert disclosures, and at the  
12 end hold that it's not appropriate to compel the Plaintiff to  
13 respond at that stage. That the parties should meet and  
14 confer about the appropriate time and, basically said that if  
15 they can't come to an agreement, that they can file -- they  
16 can re-file their motion to compel 30 days after the claim  
17 construction order.

18           Given the similarities here, that case seems to  
19 lay it out as -- better than I can do it, probably better  
20 than I just did it.

21           THE COURT: All right. So, let me hear from the  
22 other side on this issue.

23           MR. DAMSTEDT: Yes, your Honor. This is Ben  
24 Damstedt for Apple. Just a few points.

25           First, we obviously approve of your Honor's

1 tentative ruling, that this is information that Odyssey has,  
2 and it's information that would be extremely helpful to be  
3 provided early in the case.

4           So, Odyssey, as counsel has noted, provided a  
5 statement in its infringement contention that each of the 140  
6 claims that it has asserted in this case, are entitled to  
7 priority to a specific application, the June 2005 provisional  
8 application.

9           Now, in order for Odyssey to have made that  
10 statement, it needed to have a basis for doing so. And under  
11 the patent law, in order to claim priority to an earlier  
12 application, you have to show that each of the elements in  
13 the claim was disclosed in that earlier application. And the  
14 reason for that makes a lot of sense. A patentee is not  
15 entitled to capture inventions that occurred before their --  
16 before the patentee invented them.

17           So, under cases like in re: Cheu and the others  
18 that we cited in our brief, the patentee has to come forward  
19 with evidence that each of the elements, each of the claims,  
20 is entitled to that earlier priority date.

21           Now, in this case what we have, and I think the  
22 facts are relatively undisputed here, is that Odyssey had an  
23 application, continued to add new matter over time. You've  
24 got the earliest June 2005 application, which disclosed only  
25 figures one to six in the corresponding text. You've got the



1 July 2005 application, which added more disclosure, so it's a  
2 later disclosure than what Odyssey claims priority to, but it  
3 added a bunch of new matter. It added, you know, figure  
4 seven to 15, and X corresponding to that.

5           Then the biggest addition of new matter occurred  
6 in March 2008. Several years later Odyssey added a kind of  
7 entirely new embodiment that was not described in the earlier  
8 application, and used, frankly the dates for what they were  
9 arguing to the patent office is one of the reasons why they  
10 could overcome the prior in the later industry.

11           So, there's been a large additional new matter  
12 over time within Odyssey's patent. Now, what happened in the  
13 industry during that time? The industry certainly didn't  
14 stand still. In the early 2000's and before the industry  
15 developed the principles that went into the standard that  
16 Odyssey now accuses of infringement.

17           In early 2005 the industry started to put together  
18 committees that began to draft the standard that Odyssey now  
19 uses. And between 2005 and 2008 those committees formalized  
20 those standards. The very standards that Odyssey is now  
21 accusing of infringement were formalized during the period  
22 between the 2005 and the 2008 standard.

23           What that means for this case is that priority  
24 date ended, becoming a very important issue. And so it's one  
25 that really deserves a control treatment and as early a

1 treatment as possible.

2           So, for those reasons I think we would -- we would  
3 submit that the Court's tentative is correct, and that  
4 Odyssey should identify the portions of the specifications  
5 that it contends provide priority.

6           THE COURT: Thank you. And then response from  
7 Odyssey.

8           MR. CAMPBELL: Yes, your Honor. Well, I think  
9 nothing that was said there changes the University of  
10 Virginia's analysis, and so I think the appropriate stage of  
11 the case still applies.

12           What was not discussed there was really why this  
13 matter has given Defendants' invalidity contention. We've  
14 got 143 references, very few of them can be debated, because  
15 it's very difficult to parse through and figure out how  
16 they're using the various references. But, the number of  
17 references that would be -- that would be determined here,  
18 this would make a difference for it, is very, very few.

19           So, again, the University of Virginia analysis is  
20 very enlightening in terms of it -- these issues are going to  
21 be narrowed through procedures that the Court already had in  
22 place. The University of Virginia was looking at local  
23 patent rules, pretty much the same as the Southern District  
24 of California's patent rules, and held that this would be  
25 resolved through those procedures, and that this

1 interrogatory was much more appropriate to be dealt with at a  
2 later time, particularly after claim construction.

3 THE COURT: Thank you.

4 MR. DAMSTEDT: Your Honor, a few brief responses,  
5 if I may. One on the claim construction point that he just  
6 raised. One of the issues that is critical for a priority  
7 date analysis is what the scope of the claims are. If the  
8 scope of the claims is construed broadly, then the patent  
9 team needs to show more disclosure. The scope of the claims  
10 needs to be proportional to the scope of the disclosure.

11 So, it's certainly the case in the priority date  
12 issue, maybe very well during the claim construction process.

13 And two, he mentioned, you know, 143 references.  
14 Among those references are the specific standards that were  
15 formalized during that time period. So, the issue squarely  
16 presents and is fairly easy to identify from the invalidity  
17 contention. We contend that the standards that they're now  
18 accusing, are actually prior art to their patents.

19 THE COURT: Thank you. So, the Court has reviewed  
20 it. In general, once a party sends out an interrogatory, the  
21 other party has a set period of time to respond to the  
22 interrogatory. The Court also has a case management  
23 scheduling order that it issued September 4, 2015, that calls  
24 for the completion of claim construction discovery by  
25 February 11, 2016, coming right up. We're already now in

1 December of 2015, and so the end of claim construction is  
2 upon us.

3           So, I think it's helpful for the parties to know  
4 whether there is priority or not, given the nature of the  
5 suit. It's certainly within the scope of the Court's  
6 thoughts on the scheduling order. And notwithstanding the  
7 University of Virginia case, the Court has the ability to  
8 issue an order compelling an answer to interrogatory once the  
9 interrogatory has been propounded. And if there's a meet and  
10 confer and discussion of the parties, and analysis by the  
11 Court, the Court has the right and duty to say, "no, you need  
12 to do a more complete answer to that interrogatory, and not  
13 wait until expert reports or other things."

14           I also agree with the defense in this respect  
15 that, for example, if the case involves a situation where you  
16 don't have priority as to certain matters, then it would be a  
17 lower valuation. So, I also think it would be relevant as  
18 far as the parties evaluation of, is this case worthy of  
19 pursuing, what are the damages that are claimed, what is the  
20 scope of the claims that are being litigated? Are some of  
21 the claims subject to a motion for summary judgment because  
22 of a lack of priority or new matter that was added to the  
23 patents that is not the subject of a proper continuation  
24 patent?

25           So, there may be a number of things that flow from

1 a proper answer to the interrogatory. And as I said, with  
2 respect to the other interrogatory, as well, if additional  
3 information comes out, you can always move to supplement your  
4 answer to the interrogatory. But, the Court does believe  
5 that the current answer that was given is insufficient, and  
6 that you should -- that the Plaintiff should do a better job  
7 in responding as to the claim of priority. And that would be  
8 within 30 days.

9 MR. CAMPBELL: Your Honor, this is John Campbell  
10 for Odyssey Wireless. Just to be clear, your earlier  
11 statement still holds that we need to do a better job  
12 responding, but it's not required to be in chart form?

13 THE COURT: It does not have to be in chart form.  
14 All right. Thank you very much.

15 MR. CAMPBELL: Thank you, your Honor.

16 MR. DAMSTEDT: Thank you, your Honor.

17 THE COURT: So, the Court will just do a simple  
18 order that says that you appeared, and that the Court orders  
19 the Plaintiff to respond to interrogatory number six, not in  
20 chart form, and to respond further as to interrogatory number  
21 four, within 30 days.

22 And then, Plaintiff, it's up to you whether you  
23 want to then have the other side pick their best  
24 combinations. But, usually on best practices, that's  
25 something that, rather than litigating 132 possible

1 combinations of various references, it might be better for us  
2 to focus on what are the most significant ones, and that  
3 would save a lot of time and effort by everybody.

4 MR. DAMSTEDT: Yes, your Honor. We will send that  
5 interrogatory out right away.

6 THE COURT: All right. Anything further?

7 MR. CAMPBELL: No, your Honor. Thank you.

8 THE COURT: All right. Thank you.

9 MR. DAMSTEDT: Thank you.

10 (Proceedings concluded.)  
11  
12

13 I certify that the foregoing is a correct  
14 transcript from the electronic sound recording of the  
15 proceedings in the above-entitled matter.  
16

17 /s/Holly Martens 12/11/15  
18 Transcriber Date

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